

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Tiffany Dempsey	Team: Team # 1	CCRB Case #: 201400110	<input type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Sat, 12/28/2013 4:00 PM	Location of Incident: West 155th Street and Macombs Place	Precinct: 32	18 Mo. SOL 06/28/2015	EO SOL 6/28/2015	
Date/Time CV Reported Sun, 01/05/2014 3:38 PM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Sun, 01/05/2014 3:38 PM		

Complainant/Victim	Type	Home Address
1. [REDACTED] S [REDACTED]	Comp/Victim	[REDACTED]
2. [REDACTED] B [REDACTED]	Victim	[REDACTED]
3. [REDACTED] D [REDACTED]	Victim	[REDACTED]

Witness(es)	Home Address
1. [REDACTED] A [REDACTED]	[REDACTED]
2. [REDACTED] C [REDACTED]	[REDACTED]

Subject Officer(s)	Shield	TaxID	Command
1. POM Francisco Adames	04449	939842	032 PCT
2. POM Sergio Merino	07385	933993	032 PCT
3. An officer			Unknown
4. SGT Asa Barnes	02040	936173	032 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Christophe Derenze	14421	937903	032 PCT
2. POM Salahadine Mitchell	19104	921071	032 PCT
3. POF Marjorie Pierre	19620	942355	032 PCT

Officer(s)	Allegation	Investigator Recommendation
A . POM Francisco Adames	Discourtesy: PO Francisco Adames spoke discourteously to [REDACTED] B [REDACTED] S [REDACTED], and [REDACTED] D [REDACTED]	A . Substantiated
B . POM Francisco Adames	Abuse of Authority: PO Francisco Adames frisked [REDACTED] S [REDACTED] and [REDACTED] E [REDACTED]	B . Exonerated
C . POM Francisco Adames	Abuse of Authority: PO Francisco Adames searched [REDACTED] S [REDACTED] and [REDACTED] B [REDACTED]	C . Exonerated
D . POM Sergio Merino	Abuse of Authority: PO Sergio Merino frisked [REDACTED] D [REDACTED] and [REDACTED] S [REDACTED]	D . Exonerated
E . POM Sergio Merino	Abuse of Authority: PO Sergio Merino searched [REDACTED] D [REDACTED] and [REDACTED] S [REDACTED]	E . Exonerated
F . POM Sergio Merino	Abuse of Authority: PO Sergio Merino searched the vehicle in which [REDACTED] B [REDACTED] S [REDACTED] and [REDACTED] D [REDACTED] were occupants	F . Exonerated
G . An officer	Abuse of Authority: An officer frisked [REDACTED] D [REDACTED]	G . Exonerated
H . An officer	Abuse of Authority: An officer searched [REDACTED] D [REDACTED]	H . Exonerated
I . POM Sergio Merino	Discourtesy: PO Sergio Merino spoke discourteously to [REDACTED] B [REDACTED] D [REDACTED] and [REDACTED] S [REDACTED]	I . Substantiated

Officer(s)	Allegation	Investigator Recommendation
J . POM Francisco Adames	Abuse of Authority: PO Francisco Adames issued a summons to [REDACTED] S [REDACTED]	J . Substantiated
K . SGT Asa Barnes	Other: Sgt. Asa Barnes failed to prepare a memo book entry as required by Patrol Guide procedure 212-08.	K . Other Misconduct

Case Summary

On December 28, 2013, at approximately 4:00 p.m., PO Francisco Adames and PO Sergio Merino, who at the time were both assigned to the 32nd Precinct, stopped a vehicle belonging to Mr. [REDACTED] B [REDACTED], who was with Mr. [REDACTED] D [REDACTED] and Mr. [REDACTED] S [REDACTED] when he committed a Vehicle and Traffic Law infraction. While explaining which vehicle infraction had been committed, PO Adames spoke discourteously; he also spoke discourteously about Mr. S [REDACTED] to PO Merino later during the incident (**Allegation A**). During the interaction, the officers alleged that the vehicle smelled of marijuana. Mr. S [REDACTED], Mr. D [REDACTED] and Mr. B [REDACTED] were removed from the vehicle, and frisked and searched by multiple officers including PO Adames, PO Merino and an additional officer who responded to the incident (**Allegations B, C, D, E, G and H**). PO Merino searched the vehicle (**Allegation F**), and spoke discourteously to Mr. B [REDACTED], Mr. D [REDACTED] or Mr. S [REDACTED] during the incident (**Allegation I**). Mr. B [REDACTED] was arrested for unlawful possession of marijuana. PO Adames issued Mr. S [REDACTED] a disorderly conduct summons (**Allegation J**) (complaint encl. B9-15; [REDACTED] CCRB statement encl. C1-9; video/audio transcription encl. D2-6). Sgt. Asa Barnes who at the time was assigned to the 32nd Precinct and responded to the incident, failed to prepare a memo book entry in regards (**Allegation K**) (encl. E26-26).

Mediation, Civil and Criminal Histories

On May 15, 2014, Mr. S [REDACTED] filed a Notice of Claim with the City of New York, claiming the NYPD subjected him to false arrest (the claim stated that on or about March 18, 2014, all of his charges were dismissed), malicious prosecution, and excessive force; he is seeking monetary damages (encl. C10-17). As of November 5, 2014, a 50H hearing had not been scheduled (encl. G27). As a result of the ongoing claim, this case was ineligible for mediation. According to the certification of disposition number 15942, Mr. S [REDACTED]'s disorderly conduct summons (#4411068906) was adjourned in contemplation of dismissal on March 18, 2014, and dismissed on September 17, 2014 (encl. G26). Mr. S [REDACTED] has a previous conviction for disorderly conduct; he was sentenced to a conditional discharge which he violated and received a sentence of imprisonment for time served (encl. G1-5). Mr. [REDACTED] B [REDACTED] pleaded guilty to unlawful possession of marijuana in regards to this case, and paid a fine (encl. G6-10). Mr. B [REDACTED] has previous convictions of multiple traffic violations involving his license and disorderly conduct, and he was sentenced to pay fines or complete community service (encl. G11-25). As of January 15, 2015, Mr. D [REDACTED] did not have any criminal conviction history (encl. H17).

Civilian and Officer CCRB Histories

- This is the first CCRB complaint filed by or involving Mr. S [REDACTED], Mr. D [REDACTED], and Mr. B [REDACTED] (encl. B3-5).
- PO Francisco Adames has been a member of the NYPD for nine years and there is one substantiated case against him in which he received a command discipline for conducting a strip-search. Additionally, an allegation of discourteous language was pleaded against PO Adames in case #200908192 for allegedly using the words “fuck” and “shit”; however, the complainant was uncooperative. (encl. B1).
- PO Sergio Merino has been a member of the NYPD for 11 years and there are no substantiated cases against him. Allegations of discourteous language have been pleaded against PO Merino in three separate previous CCRB cases (200615753, 200805056, and 200915041). In each of these previous cases, PO Merino allegedly used the word “fuck.” All of these allegations have been unsubstantiated (encl. B2).
- Sgt. Asa Barnes has been a member of the NYPD for ten years and there are no substantiated cases against him (encl. B6).

Finding and Recommendations

Allegations Not Pleaded

- **Stop:** PO Adames and PO Merino conducted a vehicle stop; however, PO Adames is heard in the audio recording explaining that he stopped the vehicle because the muffler was too loud. The muffler is heard in the audio recording at 35:38 being excessively loud (D2-6). Because the vehicle was in violation of a NY Vehicle and Traffic Law, the allegation of a vehicle stop is not pleaded. Mr. B [REDACTED] was not issued a summons for the noise violation.
- **Search of cell phone:** Mr. S [REDACTED] stated PO Merino reached into the vehicle and grabbed his cell phone from his hand; he did not see what happened to it after the fact. Audio/video footage implies that PO Adames turned over Mr. S [REDACTED]'s phone that had fallen onto the seat and looked at its screen. Officers are later heard discussing a cell phone application Mr. S [REDACTED] was using to record the incident. As there is not enough evidence to suggest PO Adames searched through the cell phone once it was in his possession, and Mr. S [REDACTED] did not allege that PO Adames or any other officer searched his cell phone, the allegation is not pleaded.
- **Threat of Summons:** There was probable cause for Mr. D [REDACTED]'s arrest for marijuana at the time an officer told him that if he did not say who the marijuana belonged to, he would be issued a summons. Although the officer did not say what Mr. D [REDACTED] would be summonsed for, given that Mr. D [REDACTED] was uncooperative with the investigation, it appeared to be a statement of fact that Mr. D [REDACTED] would be summonsed for the marijuana. Therefore, a threat of a summons is not being pleaded.

Explanation of Subject Officer Identification

PO Adames confirmed speaking discourteously to one of the civilians during the initial vehicle stop and about Mr. S [REDACTED]. Though he did not recall if Mr. S [REDACTED] was frisked, he did confirm searching Mr. S [REDACTED], and frisking and searching Mr. B [REDACTED]. PO Adames also confirmed issuing Mr. S [REDACTED] a disorderly conduct summons. Therefore, **Allegations A, B, C and J** are pleaded against him. Though PO Merino did not recall who frisked Mr. S [REDACTED] or Mr. D [REDACTED], he did recall that they were both frisked. Mr. D [REDACTED] and Mr. S [REDACTED] identified the officer who frisked them either initially or the second time as the officer who approached the vehicle on the passenger side. PO Merino confirmed he approached the vehicle on the passenger side and later searched the vehicle. Therefore, **Allegations D, E and F** are pleaded against him. PO Adames recognized PO Merino's voice in the audio recording and confirmed PO Merino used discourteous language; therefore, **Allegation I** is pleaded against PO Merino.

Mr. D [REDACTED], who was uncooperative with the investigation other than providing an initial phone statement (encl. C18), did not provide a description of the officer who threatened to issue him a summons. Mr. D [REDACTED] initially stated PO Adames frisked and searched him a second time during the incident; however, he later stated an unidentified black male officer who later responded frisked and searched him the second time. As Mr. D [REDACTED] was not certain which officer frisked or searched him and did not provide a description of the officer who threatened him with a summons, **Allegations G and H** are pleaded against "An officer."

Recommendations

Allegation A—PO Francisco Adames spoke discourteously to [REDACTED] E [REDACTED], [REDACTED] S [REDACTED] and [REDACTED] D [REDACTED].

Allegation I—PO Sergio Merino spoke discourteously to [REDACTED] B [REDACTED], [REDACTED] S [REDACTED] and [REDACTED] D [REDACTED].

Neither Mr. S [REDACTED] nor Mr. D [REDACTED], who was uncooperative with the investigation (encl. C30), mentioned that PO Adames or PO Merino spoke discourteously during the incident (S [REDACTED] CCRB

statement encl. C1-9; D [REDACTED] phone statement encl. C18). Mr. B [REDACTED], who did not provide a phone statement, was uncooperative with the investigation (encl. C30).

Both PO Adames and PO Merino are heard on the audio recording of the incident speaking discourteously (Video/audio transcription encl. D2-6,). PO Adames is heard stating to one of the three civilians at 00:39, “We pulled you over because your fucking muffler’s too loud, and it’s illegal.” He is later heard at 08:52 stating, “The dickhead, he was sitting back here,” referring to Mr. S [REDACTED] while speaking to PO Merino about where marijuana was found in the vehicle and where Mr. S [REDACTED] was seated. PO Merino is heard on the audio recording stating to one of the three civilians at 19:42, “He don’t give a fuck about you.” PO Adames and PO Merino also used profanity while speaking to each other about which person to charge with the marijuana (06:16, 07:39, 08:24, and 09:14).

After viewing the audio/video recording of the incident, PO Adames recognized his voice (encl. E9-16). He did not recall which of the three civilians he was speaking to when he referred to the “fucking muffler.” PO Adames may have said this because Mr. S [REDACTED] had disobeyed his commands and, even though he was the passenger and not the driver, he asked why the vehicle was stopped.

PO Merino did not initially recall if PO Adames used any profanity, but after viewing the audio/video recording, he recognized PO Adames’ voice (encl. E18-24). However, although he could sometimes recognize himself as the second officer in the audio, he could not consistently recognize his own voice, even though, by all accounts, he was the only officer besides PO Adames present at that time. PO Merino stated that during some of his conversations with PO Adames, he intentionally spoke loud enough for the civilians to hear, in order for them to confess to ownership of the marijuana. However, he did not use profanity during those conversations. PO Merino felt that his safety was on the line and no one was complying with what he was saying, and the language he used was the result of that.

An officer may use profanity to forcefully make a point, to gain compliance or direction, or in the heat of a highly dangerous situation (*Police Department v. Matias*, OATH Index Nos. 1996/00 & 1997/00 (Sept. 8, 2000)) (encl. A1-10). According to Patrol Guide Procedure 203-09, an officer must be courteous and respectful (encl. A11).

The incident as depicted in the audio/video footage was relatively calm, and neither officer could point to a time when there was an inherent danger present. Therefore, the profanity used by the officers was not the result of trying to take control or gain compliance during an escalating incident. Because there was no law-enforcement objective in the officer’s use of profanity, PO Adames and PO Merino used discourteous language under circumstances which did not warrant the use of such language. Therefore, it is recommended that **Allegations A and I be Substantiated.**

Allegation B—PO Francisco Adames frisked [REDACTED] S [REDACTED] and [REDACTED] B [REDACTED].

Allegation C—PO Francisco Adames searched [REDACTED] S [REDACTED] and [REDACTED] B [REDACTED].

Allegation D—PO Sergio Merino frisked [REDACTED] D [REDACTED] and [REDACTED] S [REDACTED].

Allegation E—PO Sergio Merino searched [REDACTED] D [REDACTED] and [REDACTED] S [REDACTED].

Allegation F—PO Sergio Merino searched the vehicle in which [REDACTED] B [REDACTED], [REDACTED] S [REDACTED], and [REDACTED] D [REDACTED] were occupants.

Allegation G—An officer frisked [REDACTED] D [REDACTED].

Allegation H—An officer searched [REDACTED] D [REDACTED].

It is undisputed that Mr. S [REDACTED] Mr. D [REDACTED] and Mr. B [REDACTED] were frisked and searched, and that PO Merino searched Mr. B [REDACTED]’s vehicle.

Both officers testified that they smelled a strong odor of marijuana emanating from the vehicle upon approaching it. PO Adames testified that when Mr. B█ opened the lid to the middle console to retrieve his documents, PO Adames observed an unlit marijuana cigarette inside of it. PO Adames later recovered a clear Ziploc bag of marijuana from Mr. B█.

PO Adames vouchered a marijuana cigarette and clear zip lock bag of marijuana when processing Mr. B█'s arrest (encl. F1-2). Mr. B█ pleaded guilty to unlawful possession of marijuana in regards to this incident (encl. G6-10). Therefore, it is credited that marijuana was inside of the vehicle and that the vehicle smelled of marijuana.

The smell of marijuana alone is sufficient to provide trained police officers with probable cause to search a vehicle and its occupants. People v. Johnson, 25 Misc. 3d 1214A (2009) (Sup. Ct. Queens Cty. 2009)(encl. A12-13).

Because the civilian's vehicle smelled of marijuana, the officers had probable cause to search Mr. S█, Mr. D█ and Mr. B█ and to search the vehicle. Therefore, it is recommended that **Allegations B, C, D, E, F, G and H be Exonerated.**

Allegation J—PO Francisco Adames issued a summons to S█

According to Mr. S█ when the officers approached their vehicle, he kept his hands on his lap and did not make any movements (encl. C1-9). Mr. S█ felt unsafe and began videotaping with his cell phone which he was holding in his hand. Mr. S█ did not use any profanity during the incident and did not raise his voice other than stating that an officer stole his wallet later after he was handcuffed and seated in a police vehicle. Mr. S█ later found in his wallet a disorderly conduct summons for subsection seven, creating a hazardous condition (encl. E3).

PO Adames stated that when he asked Mr. B█ for his license and registration, Mr. S█ began reaching into his jacket pocket and failed to show the officers his hands when instructed to do so. PO Adames later added that when he initially asked Mr. B█ for his license and registration, Mr. S█ yelled, "I don't have to fucking do what you tell me to," and then reached into his pocket. PO Adames removed Mr. S█'s hand from his pocket; inside his hand was a cell phone which was recording.

Mr. S█ is heard on the video/audio recording repeatedly questioning the officers about the incident, but is never heard using profanity or yelling. When the recording begins, PO Adames is holding what appears to be a license and his memo book. Mr. S█, in a calm tone, told the officers he was going to record the incident and asked if it was alright. PO Adames then walked to Mr. S█'s door, instructed him to step out of the vehicle, and told him that he was going to teach him a lesson. A hand then covered the video camera, and the phone shook and fell onto the seat covering the camera lens. PO Adames later says to PO Merino, "I almost feel better just taking the driver. Since his friend [Mr. S█] was the one that fucking wants to open his mouth, make the driver fucking suffer for it," and "The dickhead [Mr. S█], he was sitting back here."

When shown footage of the incident, PO Adames stated that Mr. S█'s hands were inside his pockets before the recording began; he did not recall if Mr. S█ yelled or cursed before he began recording. According to PO Adames, Mr. S█ created a hazardous and dangerous condition when he yelled and cursed at the officers, and continued to reach into his jacket pocket, failing to obey orders to stop; This caused the officers to become fearful for their safety. No vehicle or pedestrian stopped at the incident location or intervened. However, because it is located off of the Macombs Dam Bridge and there was a

football game at Yankee Stadium on the incident date, vehicle traffic was heavy and there was some foot traffic.

PO Merino also stated that Mr. S [REDACTED] failed to stop reaching into his pocket when instructed to do so. PO Merino did not recall if Mr. S [REDACTED] made any statements in response to these instructions, and did not recall if Mr. S [REDACTED] made any statements while exiting the vehicle.

Sgt. Barnes, who arrived at the scene after Mr. S [REDACTED] was removed from the vehicle, was not aware that Mr. S [REDACTED] received a summons for disorderly conduct, nor what his demeanor was like during the incident. PO Derenze did not recall any civilians speaking during the incident.

Given the video/audio corroboration that Mr. S [REDACTED] had his cell phone in his hand before PO Adames even turned his attention to Mr. S [REDACTED] or asked him to exit the vehicle, and that Mr. S [REDACTED] did not curse or even raise his voice, the investigation does not credit PO Adames's assertion that Mr. S [REDACTED] yelled and cursed at the officers and refused to stop reaching into his pocket.

Mr. S [REDACTED]'s disorderly conduct summons issued by PO Adames was adjourned in contemplation of dismissal and subsequently dismissed in the Criminal Court of the City of New York on September 17, 2014 (encl. G26).

An individual may be summonsed for an offense when an officer has reasonable cause to believe that such person committed an offense. N.Y.C.P.L 150.20 (1); 140.10 (1) (a) (encl. A14-18). N. Y. Penal Law § 240.20 (7) (encl. A19) states that a person commits disorderly conduct, when with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he creates a hazardous or physically offensive condition by any act which serves no legitimate purpose. To create a hazardous condition, an individual must be causing danger of some sort. People v. Timpone, 12 Misc. 3d 1164(A) (Dist. Ct., New York, 2006) (encl. A20-22). This subsection "contemplates not acts directed at individuals but rather situations such as throwing fireworks into a crowd or loosening noxious materials within a confined [area]." Id.

Mr. S [REDACTED]'s actions did not rise to the level of creating a hazardous or physically offensive condition. There is also no evidence that Mr. S [REDACTED] acted with the intent to cause a public disruption or that he recklessly created a risk thereof. PO Adames refers to Mr. S [REDACTED], who is heard questioning the officers about the basis for the vehicle stop, as a "dickhead" in the recording. PO Adames' displeasure with Mr. S [REDACTED] likely factored into his decision to summons Mr. S [REDACTED] for disorderly conduct. However, PO Adames did not have reasonable cause to believe that Mr. S [REDACTED] committed disorderly conduct. Therefore, it is recommended that **Allegation J** be **Substantiated**.

Allegation K—Sgt. Asa Barnes failed to prepare a memo book entry as required by Patrol Guide procedure 212-08.

Sgt. Asa Barnes initially responded to the incident to verify an arrest; however, he did not create any memo book entries in regards to the incident. He testified that there was no reason as to why he did not have any memo book entries (encl. E25-30).

NYPD Patrol Guide section 212-08 states that members of service are required to maintain a daily activity log (encl. A23-25).

Since Sgt. Barnes did not have any memo book entries in regards to this incident, it is recommended that **Allegation K** be closed as **Other Misconduct Noted**.

Team: _____

Investigator: _____
Signature Print Date

Supervisor: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date